



UNITED STATES DEPARTMENT OF COMMERCE **National**
Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
One Blackburn Drive
Gloucester, MA 01930-2298

October 10, 2000

Mindy S. Lubber
Regional Administrator
Environmental Protection Agency, Region 1
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Dear Ms. Lubber,

The Magnuson-Stevens Fishery Conservation and Management Act [MSFCMA, ' 305(b)(2)] requires federal agencies such as the Environmental Protection Agency (EPA) to consult with the Secretary of Commerce (Secretary) regarding any action or proposed action authorized, funded, or undertaken by that agency that may adversely affect essential fish habitat (EFH) identified under the MSFCMA. The first designations of EFH in the New England region became effective on March 3, 1999, upon their approval by the Secretary. National Marine Fisheries Service (NMFS) personnel have discussed the new EFH requirements with EPA staff responsible for National Pollutant Discharge Elimination System (NPDES) permit issuance to determine the most efficient means to address EFH consultations for NPDES permits issued by EPA Region 1. Our staffs have agreed to conduct the required consultations using EPA's existing regulatory process under Section 402 of the Clean Water Act, as described below.

Finding

The EFH regulations at 50 CFR ' 600.920(e)(3) enable federal agencies to use existing consultation/environmental review procedures to satisfy the MSFCMA consultation requirements, if the existing procedures meet three criteria: 1) the existing process must provide NMFS with timely notification of actions that may adversely effect EFH; 2) notification must include an assessment of impacts of the proposed action as discussed in the EFH regulations [' 600.920(g)]; and 3) NMFS must have made a finding pursuant to the EFH regulations [' 600.920(e)(3)] that the existing process satisfies the requirements of ' 305(b)(2) of the MSFCMA. This document establishes NMFS' finding that the existing process used by EPA for NPDES permits may be used to satisfy MSFCMA consultation requirements, provided the steps outlined below are fully incorporated.

1. Determination – In order to determine if an EFH consultation is necessary, EPA must determine the extent to which EFH will be affected by the action. If EFH will not be adversely affected, then an EFH consultation is not necessary. EPA should indicate its preliminary determination regarding the extent to which the project will affect EFH in the fact sheet, as described below. If NMFS disagrees with this conclusion, it has the option of providing conservation recommendations. EPA must respond to these conservation recommendations in the same fashion as any other conservation recommendations, as outlined below.

2. Notification - EPA must provide NMFS with timely notification of actions that may adversely affect EFH. For projects authorized through the NPDES permit process, notification for purposes of EFH consultation can be accomplished in the permit fact sheet. Notification will occur when NMFS receives a



draft permit, public notice, and fact sheet.

3. EFH Section of Fact Sheet – A section clearly marked “EFH” must be included in each fact sheet. This section will contain EPA’s determination regarding whether the action could result in adverse effects to EFH, and an EFH assessment (if applicable).

For most projects in which the level of effect to EFH is not substantial, the EFH Assessment can be included as a statement in the fact sheet. If EPA determines that the project will not have a substantial adverse effect on EFH, an abbreviated consultation will be performed. If the EPA preliminarily determines that there will be substantial adverse effects to EFH as a result of a project, an expanded consultation will be required, and a more detailed EFH Assessment will be necessary.

The level of detail in the EFH Assessment should be commensurate with the threat to EFH. Actions that may cause substantial adverse effects to EFH will require a detailed EFH Assessment that may be separate from the public notice/fact sheet. NMFS will notify EPA as soon as possible in cases where a detailed EFH Assessment is necessary. Upon completion of a detailed EFH Assessment, EPA will submit the document to NMFS for review and preparation of EFH conservation recommendations.

All EFH Assessments must include the following:

- 1) a description of the proposed action;
- 2) an analysis of individual and cumulative effects of the action on EFH, the managed species, and associated species such as major prey species, including all affected life history stages;
- 3) EPA’s determination regarding effects on EFH; and
- 4) a discussion of proposed mitigation, if applicable.

Additional information which may be appropriate for an EFH Assessment is listed in the EFH regulations [50 CFR 600.920(g)(3)].

An EFH Assessment may incorporate information by reference to another EFH Assessment prepared for a similar action, supplemented with any relevant new project specific information, provided that the proposed action involves similar effects to EFH in the same geographic area or a similar ecological setting, and provided that a copy of the prior EFH Assessment is attached to facilitate review by NMFS. An EFH Assessment may also incorporate or append other relevant documents.

4. NMFS EFH Conservation Recommendations - Upon review of the complete EFH Assessment, NMFS may develop EFH conservation recommendations. EPA’s public review and interagency coordination processes provide at least 30 days for public review of the public notice and fact sheet. Conservation recommendations will be provided within the public comment period specified by the EPA, in a section of the NMFS comment letter entitled “EFH Conservation Recommendations.” When the EFH Assessment is provided after the issuance of the public notice and fact sheet, NMFS will respond within 30 days from receipt of the EFH Assessment.

5. EPA Response - The MSFCMA [‘ 305(b)(4)(B)] requires that federal agencies provide a written response to NMFS within 30 days after receiving NMFS conservation recommendations. If EPA is not able to respond fully within 30 days, EPA may send a preliminary response stating that it is in the process of fully considering NMFS recommendations and has not yet made a decision on the project, but will respond in detail as soon as possible. The EPA response should be provided to NMFS at least 10 days before EPA makes a final decision, in order to allow time for dispute resolution, if necessary.

EPA's response must include a description of measures proposed by EPA for avoiding, mitigating, or offsetting the impact of the activity on EFH, as required by the MSFCMA [16 U.S.C. 305(b)(4)(B)] and EFH regulations [50 CFR 600.920(j)]. In the case of a response that is inconsistent with NMFS conservation recommendations, EPA must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action or the measures needed to avoid, minimize, mitigate, or offset such effects.

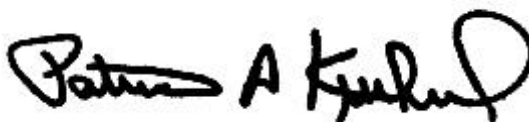
If EPA accepts all of NMFS conservation recommendations in their entirety, the EPA authorization letter to the applicant or permit transmittal letter will explain how these recommendations were incorporated into the authorization (e.g., as special conditions). The EPA will provide copies of these letters to NMFS and this information will constitute EPA's written response.

6. Dispute Resolution - If an EPA decision is inconsistent with NMFS conservation recommendations, the EFH regulations [50 CFR 600.920(j)(2)] allow the NOAA Assistant Administrator for Fisheries to request a meeting with a EPA headquarters official to discuss the proposed action and opportunities for resolving any disagreements. NMFS will endeavor to resolve any such issues at the field level wherever possible, typically in a meeting between the NMFS and EPA Regional Administrators.

Conclusion

If you agree with the procedures described above, please respond by letter indicating your concurrence. Should you have any questions on this matter, please contact Peter Colosi at 978/281-9332 or Lou Chiarella at 978/281-9277 for assistance.

Sincerely,



Patricia A. Kurkul
Regional Administrator

cc: Oxford - Goodger
Sandy Hook - Gorski
Gloucester - Colosi, Chiarella, Stephan
EPA – Manfredonia, McSweeney, Nelson